

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
The Connect America Fund)	WC Docket No. 10-90
)	
)	
A National Broadband Plan for our Future)	GN Docket No. 09-51
)	
)	
High Cost Universal Service Support)	WC Docket 05-337
)	
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	

**Response to United States Telecom Association’s Petition and Reply to
Commenters’ Support to Reconsider the Commission’s Tribal Engagement
Requirements Under the Paperwork Reduction Act.**

The Fort Mojave Telecommunications, Incorporated (FMTI), files the following comments in response to and in opposition to the United States Telecom Association’s Petition for the FCC to reconsider the Commission’s Tribal Engagement provisions in the Commission’s proposed Form 481 data collection requirements¹.

¹ Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments

I. Introduction

The Fort Mojave Telecommunications Incorporated (FMTI) is a regulatory telecommunications service of the Fort Mojave Indian Tribe Tribal located at the juncture of Arizona, California and Nevada. The Tribe has approximately 1100 tribal members residing within the community.

Fort Mojave is an illustration of a Native community that has been on both sides of the digital divide. Up through the late 1980's, less than 10 percent of the community could access telephones to call 911 for emergencies. After forming its own regulatory telecommunications service in 1989, Ft. Mojave has brought 115 miles of fiber-optic broadband to 98 percent of its community. Today, the Tribe stands as a model for rural economic development and for modernized public safety responsiveness in a highly remote region.

II. Response to the objections raised by the Petitioner and Commenters.

A. Pettioners: Form 481 data collection on Tribal Engagement is Unreasonable and Unnecessary, and therefore should be removed.

While the Petitioner and commenters in this proceeding (and in previous proceedings) disagree with the policy of promoting ETC engagement with Tribal governments, the Paperwork Reduction Act's imperative to ease paperwork burden

and assay data collection relevancy has no bearing on the FCC's implementation of a tribal engagement policy. (see discussion on the Tribal Engagement imperative below.)

On the other hand, requiring regulatory providers charged with providing universal service to sovereign nations, and to “unserved” areas, to engage with tribal governments is a vital and important policy that is neither unreasonable nor unnecessary. The Paperwork Reduction Act should not impinge on the essential governmental functions of promoting Federal Trust Relationship responsibilities or from carrying out the universal service mandates of the Communications Act of 1934.

The reporting requirements on tribal engagement should not be confused with or entailed with the FCC policy of commercial engagement with Tribal governments. Certifying adherence to the permitting requirements and land use laws of sovereign nations, or of any jurisdiction, is a precept of providing regulatory service, and such certification is not per se unduly burdensome nor pose an unreasonable data requirement.

While FMTI agrees with U.S. Telecom Association and other commenters that tribal engagement obligations should not be imposed on ETCs that will no longer be supported or that do not receive universal service support, practically speaking, failure by a carrier operating on Tribal lands to engage with the aggregate customer and community representative will only hamper fruitful commercial service—and extend the legacy of underservice on Tribal lands.

Paperwork Reduction goals aside, failure to certify (and adhere to) tribal permitting for land use and business licensing would support illegal activity on Tribal lands and abrogate federal trust relationship with sovereign nations under color of federal regulatory authority. (see discussion below)

B. Petitioners: The Commission should reconsider the Tribal Engagement Imperative

The National Tribal Telecommunications Association (NTTA) and Fort Mojave Telecommunications, Incorporated have previously addressed the imperative of promoting the FCC's trust relationship with Sovereign Nations.²

Notwithstanding the Blooston Rural Carriers' view³ that rural carriers already provide voice and broadband access to the majority of tribal areas, Native and Tribal lands suffer the greatest disparity of broadband access in America. Native communities are less likely to have broadband access by nearly 250 percent compared to non-Native rural communities, and by nearly 350 percent compared to all American communities.

In a remarkable off-handed dismissal, USTA stated:

"The Commission also should reconsider the *Further Guidance*⁴ because ONAP failed

² See NTTA's opposition to the Blooston Rural Carriers Petition for Reconsideration, filed Feb.9, 2012, as well as comments filed for CAF and USF rulemakings.

³ "the Commission failed to consider the comments of various ILECs and the data in the National Broadband Map which shows that many ROR ETCs already provide access to voice and broadband service to the vast majority of areas on Tribal lands and within their service territory", Blooston comments at p. 6.

⁴ *Office of Native Affairs and Policy, Wireless Telecommunications Bureau, and Wireline Competition Bureau Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund*, Public Notice, DA 12-1165, WC Docket Nos. 10-90 *et al.* (July 19, 2012) ("Further Guidance").

to consider that compliance would unduly burden ETCs, **while offering little offsetting benefits for Tribes** – a result that contravenes the Commission’s policies and the requirements of the PRA.”⁵ (emphasis added)

USTA also added:

“Neither the Commission nor ONAP has demonstrated that mandatory Tribal engagement requirements will have any practical utility to promoting broadband deployment in Tribal lands or improving existing voluntary relationships between ETCs and Tribal leaders. Furthermore, the Tribal engagement requirements impose significant burdens on ETCs – burdens that the *USF/ICC Transformation Order* and the *Further Guidance* overlooked rather than sought to “minimize” as required under the PRA.”

This cynical view ignores the recurrent request by Native communities for greater access to and greater measures to attain telecommunications services. The rest of Fort Mojave’s comments will address the reasonable policy of requiring regulatory providers to engage tribal governments in delivering practical solutions to meeting broadband underservice in Native communities and for complying with tribal land use and permitting on Tribal lands.

Tribal Request

On October 18, 2011, the National Tribal Telecommunications Association (NTTA), representing 12 Tribes; the National Congress of American Indians (NCAI), representing over 300 Tribes; and the Affiliated Tribes of Northwest Indians (ATNI), representing 57 Tribes, asked the Commission to promote Native sovereignty with specific measures to effect change in the provisioning of regulatory service to Native Nations⁶. (NTTA, NCAI, ATNI and FMTI also sought a targeted comprehensive

⁵ United States Telecom Association’s Petition for Clarification and Reconsideration, April 4, 2013, p. 4.

⁶ Ex parte filings of meetings with the FCC, October 18, 2011.

Commission program, a Native American Broadband Fund, to promote broadband in Tribal communities, as well as hold-harmless measures for Tribal regulatory services from proposed cuts in the USF and ICC reforms). Citing the need for greater control over provisioning of regulatory services to unserved tribal communities, the Tribal representatives requested:

“Native Nations would like the FCC to require ETCs to attain permission from Native Nations to serve Native communities, and require commercial consultation on quality of service in and public interest obligations to Native communities.”⁷

This unified Native community request for consultation and commercial engagement with Tribal governments was supported by over 300 Tribes.

C. On Commercial Engagement with Tribal Governments

Blooston Petitioners: The requirement for wireline ETCs to meaningfully engage tribal governments is not supported by the record, and is thus arbitrary and capricious.

Response: A sufficient Record has been developed to justify the Commission’s Tribal Engagement Policy.

In the proceeding *In the Matter of Improving Communications Services for Native Nations*, CG Docket 11-41, the Commission asked in paragraph 31 about the nature of consultation with Tribal governments in ETC designations. NTTA responded:

“NTTA has commented on consultation with Native Nations by regulatory providers. As a pre-condition for ETC designation process, the applicant should consult with the Tribal government or Native community first, describe the service plan, how the provider may plan to serve the entire community, the processes to address quality and quantity complaints by individuals and the Tribe, and how the regulatory provider will adhere to attaining legal rights of way and all permitting requirements of the Tribal government or Native community. The applicant should agree that failure to comply with the terms of the ETC application or to consult

⁷ Ex Parte comments by the National Tribal Telecommunications Association, the National Congress of American Indians, and the Affiliated Tribes of Northwest Indians, October 18, 2011.

with the Tribal government or Native community will cause the FCC to divest the provider of their ETC status and their receipt of support from Section 254 on Tribal lands. The ETC applicant should also agree to re-invest or spend its support and recovery funds within the Tribal or Native community Section 254 funding was derived from.”

In addition, in paragraph 75, the Commission asked about the most productive and efficient manner in which the FCC can structure a consultation process unique to the Commission, and how it could consult with Native Nations to achieve a meaningful exchange of information and perspectives. (In paragraph 76, the Commission asked for specific recommendations.)

In response, NTTA urged an improved Nation-to-Nation consultation between the FCC and Tribal governments—referencing the Commission’s Trust policy.⁸ NTTA went on to describe specific levels of consultation essential for Tribes to alter historic underservice and become more self-sufficient in influencing the provisioning of regulated service that is not being provided to Tribal lands:

“NTTA recommends the FCC undertake three types of consultations: 1) educational seminars that highlight regulatory sectors, e.g. wireline, wireless, cable, satellite, mass media, public safety, that inform the Native community about technology, service, and regulatory framework for each sector; 2) consultations regarding on-going regulatory policy proposals and impending changes, particularly rulemakings or enforcement actions that will materially or significantly impact Tribal lands and Native communities; and, 3) consultations that monitor progress of regulatory policy and commercial service implementation affecting tribal communities. In the last category of monitoring regulatory and commercial implementation of service and policy, the FCC must establish a mechanism for direct tribal recommendations and comment on regulatory policy modifications and commercial service adjustments, with a clear and direct sovereign pathway for recommended enforcement by the FCC on behalf of Tribal governments and Native communities.

NTTA recommends the FCC require regulatory providers that serve Native communities to consult with Tribal governments or Native organizations that represent Native communities under the principle that regulatory services are delegated authority to commercial providers implementing the public interest requirements of the Communications Act.

For specific regulatory consultations, the FCC should hold regional meetings or periodic telephonic conferences that highlight the detailed and germane regulatory proposals that will impact Tribal lands and Native communities.

⁸ NTTA comments, *In the Matter of Improving Communications Services for Native Nations*, CG Docket 11-41, page 29. Also, see the FCC’s Trust Relationship Policy, *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) (“*Tribal Policy Statement*”).

As a matter of Tribal interest and inclusion, consultation on regulatory policy should extend beyond Tribal governments and should engage Tribal communities. It should not preclude service, regional and industry organizations that have a strong record of expertise implementing telecommunications solutions.”⁹

Finally, in the Mobility Fund NPRM, NTTA commented:

“The FCC should require Mobility Fund providers to consult with Native governments. An essential component of Native sovereignty is the process of consultation. While federal trust principles require government-to-government consultation with Native governments, the notion of consultation with tribal governments for commercial transactions affecting an entire community is emerging. The National Congress of American Indians passed a resolution (becoming the official policy of Indian country)¹⁰ urging the FCC to set aside a sufficient amount from the Broadband Mobility Fund to assist Tribes with essential safety-net infrastructure predicated on a 4G platform. That resolution included a requirement for any Mobility Fund provider serving Native communities to consult with the Native government to better meet the needs of the community and to obtain all the necessary legal permissions for bringing service and infrastructure to Native communities.”¹¹

In FMTI’s view, the FCC has a full record of Tribal views on Tribal consultation and Commercial Engagement with Tribal Governments.¹²

Petitioners: An engagement obligation on all ETCs serving Tribal lands is not necessary to promote the universal deployment of broadband service. The Commission has not shown such engagement is important or necessary in any way, let alone “vitally important,” to advance the goal of universal service.

Response: ETC engagement is vitally important to tribal nations and essential for meeting public interest obligations in hard-to-serve, remote, or high-cost areas. Failure to engage tribal governments will perpetuate the history of underservice on Tribal lands.

⁹ Ibid, page 30.

¹⁰ NCAI resolution ABQ-10-061 calling for Federal support for Native broadband development and earmarking Broadband Mobility Fund for Native communities.

¹¹ Ibid, page 24.

¹² Other tribal organizations provided comments and recommendations to address “underservice” issues and measures to strengthen Tribal sovereignty. (see also the Commission’s Twelfth Report and Order.)

The FCC has demonstrated throughout policy¹³ and regulatory decisions that it recognizes action on Tribal underservice is “vitally important” to advance the goal of universal service. In the Commission’s Order on Reconsideration for the Standing Rock ETC petition¹⁴, it strongly emphasized:

“We also find that this conclusion aligns with the nature of Tribal sovereignty. Congress usually intends that its “statutes . . . be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”¹⁵ This canon is “rooted in the unique trust relationship between the United States and the Indians.”¹⁶ The Commission has recognized its “fiduciary duty to conduct [itself] in matters affecting Indian tribes in a manner that protects the interest of the tribes” and its corresponding obligation to interpret “federal rules and policies . . . in a manner that comports with tribal sovereignty and the federal policy of empowering tribal independence.”¹⁷

In the Standing Rock Order on Reconsideration¹⁸, the Commission reiterated the universal service goals:

“These goals take on acute importance when considering a designation on Tribal lands, where the Commission has assumed a special role in “promoting access to wireless radio and other communications services,” given that rates of telephone and broadband penetration are “significantly lower” on Tribal lands than elsewhere in the United States.”¹⁹

¹³ see the FCC’s Trust Relationship Policy, *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) (“*Tribal Policy Statement*”).

¹⁴ Standing Rock Order on Reconsideration, WC Docket 09-197, June 21, 2011, para. 15.

¹⁵ *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

¹⁶ *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

¹⁷ *Twelfth Report and Order*, 15 FCC Rcd at 12266, para. 119.

¹⁸ Standing Rock Order on Reconsideration, para 13.

¹⁹ *Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal lands*, WT Docket No. 11-40, Notice of Proposed Rulemaking, FCC 11-29, at 3–4, paras. 4–5 (rel. Mar. 3, 2011); see also *Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, FCC 11-30 (rel. Mar. 4, 2011); FMTI Referral Comments at 1.

In the Commission's First Order on Rural Radio Service providing a Tribal priority for licensing²⁰, the Commission said:

"Tribes have an obligation to 'maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life,' within their jurisdictions,²¹ and that the Commission has a longstanding policy of promoting tribal self-sufficiency and economic development, as well as providing adequate access to communications services to Tribes.²²"

The 12th Report and Order²³ said:

"The Commission found the enhancement of tribal communities' access to telecommunications services consistent with its obligations under the Act to preserve and advance universal service, and its obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes to encourage tribal sovereignty and self-governance."²⁴

By any application or interpretation of the Commission's consistent findings, application of the Communications Act's Title I imperatives, Section 214 or Section 254 principles, it is apparent tribes have not been afforded a "fair, efficient, and equitable distribution" of broadband service with regard to Tribal lands.²⁵

In previous FCC comments, NTTA has asked the FCC to implement a second variety of "commercial consultation" to help Tribal communities attain the deployment of regulatory service and to negotiate and monitor the quality of

²⁰ 47 U.S.C. § 307(b) ("Section 307(b)").

²¹ S.Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (quoted in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S.Ct. 894, 903, 71 L.Ed.2d 21 (1981)).

²² *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) ("Tribal Policy Statement").

²³ Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000) (*Twelfth Report and Order*).

²⁴ *Id.* at 12222, para. 23, 12222-24, para. 26.

²⁵ Referencing the Commission's reasoning in establishing a Tribal Priority for mass media licensing under Section 307(b) of the Act.

regulatory service provided to the Tribal Nation. Since Tribes are the worst served communities in America, ETC engagement with the representative government, the aggregate advocate of an insular community, improves the efficiency of the universal service support system. In addition, borrowing from the requirement of the FCC's Trust Relationship Policy to consult with Tribes on policies with "material" impact on Tribes²⁶, ETCs have a delegated public interest responsibility to consult with Tribes on underservice priorities, and policies and plans that have "material" impact on the Tribe.

The Commission must take all necessary regulatory and policy measures to bring parity of broadband technology and service to Native communities as a requirement of the universal service mandate of the Communications Act and of the Commission's Federal Trust relationship responsibilities.

D. Why is Tribal Engagement Important?

1. The Commission has an opportunity to address "Underservice" or improve efficiency of service to "unserved areas" by engaging with Tribal Consumers

The Commission has a public interest obligation to monitor and ensure the provision of universal service to all Americans.²⁷ Section 254(b)(3) focuses on access in rural and high cost areas, with particular emphasis on "low-income

²⁶ *Ibid.*

²⁷ 47 U.S.C. 254.

consumers and those in rural and high-cost areas” having access to telecommunications and information services “that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”²⁸ Consumers are rarely afforded an opportunity to participate in service policies that materially impact them.

Tribal communities have been historically underserved and are today the worst connected communities in the United States. Because Tribal governments have a government-to-government relationship with the Federal government and the Federal Communications Commission has Trust relationship responsibility to tribes, it is befitting that the Commission acts to improve the efficiency of regulatory service by promoting ETC engagement with the Tribal government as the direct representative of tribal consumers.

Engaging with Tribal governments is the most efficient means of assessing the needs of entire insular communities. Engagement also helps with assessing public interest obligations. In addition, since the Commission’s Trust relationship policy requires the Commission to consult with Tribes on policies that have a

²⁸ 47 U.S.C. 254.

material impact on Tribes²⁹, regulatory providers should similarly consult with Tribes on services that have a significant or material impact on the Tribal community.

2. Public Safety Obligations and Requirements Necessitate Engagement between ETCs and Tribal Governments

In the Matter of Improving Communications Services for Native Nations, CG Docket 11-41, in paragraphs 37, 38, 41, 42 and 45, the FCC asked how public safety and emergency communications are provisioned on Tribal lands and on the status of current plans for public safety and emergency communications on Tribal lands. NTTA commented at length about the need for public safety planning, infrastructure, coordination, 911 mapping, and resources for Tribal lands.

NTTA replied: “Many Native communities are not consulted on emergency service planning. PSAP configurations are in need of reform and resourcing for PSAP service is frequently the last funded and first cut budget options by states. Most Native communities are not mapped for E-911 addresses. GPS based residential coordinates are not available in most Native communities. Of course the paramount obstacle is sufficient funding and resourcing to solve these issues. Timely coordination of law enforcement, fire fighting and medical response services is always a criticism in Native communities, due to lack of resources, lack of appropriate coordination, lack of training, lack of equipment and lack of modern

²⁹ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) (“*Tribal Policy Statement*”).

equipment, lack of interoperability between emergency services, and lack of planning and community coordination.”³⁰

Public interest dictates ETC participation in the planning for public safety deployment in Tribal communities. ETCs serving Tribal lands should engage with tribal governments on public safety planning, network deployment and coordination of Tribal, Federal and ETC resources. To argue there is no role for Tribal government engagement with regulatory carriers at best ignores the essential link the PSTN has with public safety networking, and at worst, demonstrates the failure of current public safety, emergency and homeland security policy in rural and tribal areas.

3. Connecting Anchor Institutions Necessitates Engagement Between Tribal Governments and ETCs

ONAP’s guidelines focus on reaching anchor institutions. This emphasis recognizes that in most poor communities residential broadband service is either unavailable or financially unattainable and the only access to broadband and Internet is through governmental offices or public service centers. Anchor institutions are essential components of Native communities acting as interface between Tribal government and the Native community. Anchor institutions provide essential public service to community residents, provide important information, and are catalyst to social networking and wellness strategies. They often are the leading edge of community economic development, helping to stimulate private sector enterprise. That being the case, connecting anchor institutions (governmental service, health, education, job skills and entrepreneurial training, economic development and social service) is the highest

³⁰ *In the Matter of Improving Communications Services for Native Nations*, CG Docket 11-41, at page 25.

priority for Native communities. In addition, broadband adoption can be best facilitated through anchor and public institutions, where public computers are provided. There, Native residents can learn how to utilize broadband and the Internet and acquire digital literacy—particularly if the Tribe plays an active role in supporting digital literacy and broadband adoption.³¹

In communities where the Tribes have created their own telecoms, Tribal telecoms are obligated to provide state-of-the-art technology and broadband service to public anchor institutions in their communities.³²

FMTI notes telemedicine is vital to the wellbeing of Native rural communities. However, the challenge is the lack of capacity of underlying PSTN networks. While Broadband capacity varies from local market to local market, higher end telemedicine—transmission of EKG and other imaging—may require up to 1 gigabit throughput capacity, which are generally unattainable for remote health clinics.³³

Indeed, the Telecommunications Act amendments underscored the vital role of certain anchor institutions. Section 254(c)(3) said: “In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).”

³¹ Ibid, page 18.

³²Key institutions include Government offices; schools; libraries; public safety offices and emergency services; health clinics; business and economic development offices and entities; community centers; senior centers; Headstart centers; waste and sewage and power authorities; boys and girls clubs; food commodity centers; fire-fighting towers; and a range of federal offices operating on Tribal lands, such as BIA, fish and wildlife, EPA, Homeland Security, and other resource and support authorities on Tribal lands.

³³FMTI comments in: *In the Matter of Improving Communications Services for Native Nations*, page 18.

The above discussion underscores the challenge of connecting Tribal lands. As an insular community, the full benefit of and adoption of broadband access requires a combined residential and public anchor institution plan. The only way broadband adoption and anchor institution deployment can be coordinated is through Tribal government engagement with the regulatory provider. The FCC's promotion of Tribal engagement therefore is essential to the fulfillment of Section 254 universal service public interest obligations.

4. A Native Focused Broadband Mapping Strategy Requires Coordination Between ETCs and Tribal Governments

NTTA has documented broadband mapping errors in New York and Washington, and mapping access issues in Arizona. Broadband mapping greatly impacts the comprehensive deployment of broadband to unserved and underserved communities. Lack of knowledge of infrastructure reach and broadband capacity will delay resource driven broadband solutions. In NTTA's FNRPM comments, it noted: "The Department of Commerce's state-wide Broadband Mapping Program may be able to provide adoption and utilization information, but may need specific prompts to gather relevant information. (NTTA notes that state broadband mapping of tribal areas has been largely unsuccessful and thus NTTA has proposed a specific title of its proposed Native Nation Broadband Fund to getting the Native Broadband Mapping done right,

with emphasis on identifying barriers, and attaining feedback on broadband adoption measures.)”³⁴

A comprehensive Native broadband mapping scheme cannot be completed without coordination and cooperation between ETCs and Native governments. ETC engagement with Tribal governments is essential to ensuring the right federal (and state) resources are brought to bear on broadband underservice.

Blooston Petitioners: Requirement that ETCs demonstrate compliance with Tribal business and licensing requirements, including certificates of public convenience and necessity from Tribal governments, violates state and federal law, the Communications Act and it is beyond the scope of the Commission's jurisdiction.

Response: Failure to comply with permits for Tribal rights of way and legal permits violates the sovereignty of Tribal Nations and implicates the Commission in illegal activity on Tribal lands. The Federal government has jurisdiction within Tribal lands and is ultimately charged with responsibility for issuing and monitoring certificates of public convenience and necessity.

E. The Federal Communications Commission Has Compelling Interest and Obligation to Protect and Promote the Public Interest on Tribal lands.

Petitioners cannot hide behind state jurisdiction with regard to public interest and universal service obligations on Tribal lands.

The Communications Act gives the Commission express authority to “prescribe such rules and regulations as may be necessary in the public interest to

³⁴ Ibid, at page 19.

carry out the provisions of this Act.”³⁵ The Act also prescribes “It shall be the duty of every common carrier... to furnish such communication service upon reasonable request...”³⁶ In the case of Tribal communities, if Tribal governments are making reasonable requests for full and comprehensive service to its community, it appears reasonable that common carriers are required to “engage” with the governmental representative of consumers on provisioning and quality of service to a Tribal community.

The FCC has compelling interest to monitor public interest obligations on Tribal lands.³⁷ States have little motivation to enforce public interest on Tribal lands.³⁸ The Standing Rock Order on Reconsideration³⁹ re-emphasized the Federal interest and authority of the Commission on Tribal lands. Here, the Commission’s Title I, Section 201, 202 and 254 authority compels the Commission to protect the public interest of Tribal communities by engaging Tribal governments in the public interest monitoring and consumer rights on Tribal lands.⁴⁰ Notwithstanding states’ certification of ETCs serving Tribal lands, public interest obligations do not diminish

³⁵ 47 U.S.C. 201.

³⁶ Ibid.

³⁷ 12th Report and Order.

³⁸ In the Standing Rock Order on Reconsideration, the Commission analyzed Federal interest on the Section 214(e)(6) overlap with 214(e)(5) redefinition authority: “Consistent with our precedent, we conclude that, because we here designate Standing Rock to serve the part of the service area of each of the rural telephone companies that lies within the limits of our jurisdictional authority, redefinition is unnecessary and no state commission need consent before Standing Rock’s designation takes effect. No party disputes that when a commission designates a carrier throughout an entire rural service area, section 214(e)(5) does not require redefinition. In the *Virginia Cellular Order*, the Commission did not need to redefine any of the rural service areas that Virginia Cellular could “serve completely.”³⁸ Nor did the Bureau suggest redefinition or state consent was necessary when it designated Hopi Telecommunications as an ETC throughout the “entire study area” of the local rural telephone company.”

³⁹ Standing Rock Order on Reconsideration.

⁴⁰ 47 U.S.C. 254(b)(3).

or change on Tribal lands, particularly when the record of overall telecommunications service (particularly broadband service) to Tribal lands has been dismal. (FMTI recognizes and applauds the efforts of RLECs that have met their public interest obligations on Tribal lands.)

F. ETCs as Regulatory Providers with Public Interest Obligations Cannot Knowingly Ignore Tribal Laws, Contravene Tribal Sovereignty, nor Absolve Itself from Federal Policy Requirements on Tribal lands.

The FCC has given special accord to Tribal governments.⁴¹ “We are mindful of our obligation to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance.”⁴² The Commission also recognized the public interest need to assist Native communities:

“The Commission has recognized that Native American communities have the lowest reported level of telephone subscribership in America”⁴³

It is a basic tenet that ETCs have a duty and obligation to provide service to all customers without discrimination, with just, reasonable and affordable rates, comparable to rates in urban areas.⁴⁴ A telecommunications carrier must be

⁴¹ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 12208 (2000) (“*Twelfth Report and Order*”).

⁴² Mescalero Apache Telecom, Inc. Order, FCC 01-13.

⁴³ Sacred Winds Communications Inc. Order, DA 06-1645.

⁴⁴ 47 U.S.C. 254.

designated as an ETC and must offer services throughout its entire service area in order to receive universal service support.⁴⁵

The Act is firm that carriers cannot “subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.”⁴⁶

“The Commission, States, and all regulated carriers are required to make availableto all the people of the United States, without discrimination, ...a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges...”⁴⁷

“No carrier shall undertake service or extension of lines without a certificate of public convenience and necessity from the Commission. Similarly, no carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby”.⁴⁸

It is clear that the FCC has the authority to define services to be covered under Section 254(c) support, how to target underservice, and how best to remove the impact of any “undue” or “unreasonable” results or disadvantage. The Commission has the authority to act pursuant to “such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act” 254(b)(7). The Commission has also observed that *the “determination of jurisdiction over a carrier serving Tribal lands is an inquiry that will extend beyond questions of state law, and will be informed by principles of tribal sovereignty, federal*

⁴⁵ 47 U.S.C. § 254(e) (stating that only an ETC is “eligible to receive specific Federal universal service support”).

⁴⁶ 47 U.S.C. 202.

⁴⁷ 47 U.S.C. 151, Section 1.

⁴⁸ 47 U.S.C. 214(a).

law, and treaties”⁴⁹ especially under Section 254(c)(1)(D) to the extent such telecommunications services “are consistent with the public interest, convenience, and necessity.”⁵⁰

In regards to the Commission requiring ETCs to comply with the legal requirements for rights-of-way and other Tribal legal permitting, Section 253(c) of the Act states: “Nothing in this section affects the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, if the compensation is publicly disclosed by such government.”⁵¹

Federal policy toward Tribal Nations should not be laid aside because of the source of an ETC’s certification. As delegated public interest providers, regulatory carriers should be held to the standard of public interest and respect for the sovereignty of Tribal Nations, as are required by Federal Statutes and Constitutional principles. To contravene Tribal legal authority or federal Trust responsibilities would violate the Commission’s Federal Trust relationship with Tribal Nations.

Petitioner: The Commission’s requirement concerning marketing over-reaches Commission authority and violates the First Amendment of the Constitution of the United States.

Response: In return for receiving public funding, ETCs have to meet public interest obligations, and, as such, cannot escape public interest obligations under cover of commercial free speech rights. Public interest obligations to advertise and consult with Tribal governments are not restrictions on free speech.

⁴⁹ Twelfth Report and Order, *Id.* ¶ 125.

⁵⁰ In the Matter of Improving Communications Services for Native Nations, CG Docket 11-41.

⁵¹ 47 U.S.C. 253(c)

Section 214(e)(1)(B) of the Act requires Eligible Telecommunications Carriers (ETCs), in order to receive universal service support, to advertise the availability of services offered under Section 254(c) and the charges therefor. The Commission's requirement to "Engage" with Tribal governments is a special means of advertising the regulatory services and public interest obligations of the ETC on Tribal lands. This advertisement and Engagement is unique to Tribal Nations and fulfills the Section 254 special service mandate to connect Schools, Libraries and health care providers with advanced technology.⁵² The Commission is given authority to apply "such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act."⁵³ Such commercial and public interest Engagement with Tribal governments furthers the strong public interest of the Commission to both consult with Tribal governments and to fulfill the universal service mandates on Tribal lands.

The Boorston rural carriers and U.S. Telecom Association petitioners are regulatory providers receiving public funding as carriers of last resort and as such cannot avoid advertisement and consultation with consumers by raising commercial free speech impediments to service consultation, especially with Tribal governments that represent consumer interests and the needs of the Tribal community. Tribal governments represent the interests of residents in underserved and unserved Tribal communities. They, in turn, have a public interest obligation to

⁵² 47 U.S.C. 254(b)(6) and 254(c)(3).

⁵³ Ibid, at 254(b)(7).

their regulatory constituents. There is a substantial Federal and a tribal governmental interest in the provision (or lack of provision) of regulated advanced technology service on Tribal lands. Yet the “Engagement” provisions of the Commission may further other statutory and governmental purposes for making more efficient use of public funding for universal service (to connect previously unconnected Tribal residents and to attain parity of technology and rates with urban and non-Tribal areas.) Consultation with a residential representative can improve efficiency of universal service and improve the quality of regulatory service lacking in most Tribal communities. Customer care Engagement may save costs in the long run to the both the provider and to the Connect America Fund. More importantly, it permits Tribal governments to coordinate public safety and emergency service planning, educational targeting, health care provisioning, and anchor institution connectivity, as mandated by Section 254 of the Act.

FMTI concurs with and defers to the National Congress of American Indian’s, Native Public Media’s and Navajo Nation’s legal analysis on the compelling Federal interest in Indian laws that support the Communications Act mandates to move forward to support Tribal sovereignty and assist Tribes.

G. The FCC is using the Least Drastic Measure to Bring Regulatory Providers to Bring ETCs to Tribal Consumers

The requirement for commercial engagement with a Tribal government has a fundamental and direct impact on meeting the mandates of Title I, section 214 and 254 of the Act. As such, the Commission’s forward-looking requirement for

commercial Engagement with Tribal governments is "vitally important to the successful deployment and provision of service" and attainment of universal service on Tribal lands.

The simple process of bringing regulatory providers on Tribal lands, who are receiving funding support for its activities, together with Tribal Governments as consumers is something that should have been taking place as a matter of sound business practice.

The commercial engagement can be narrowly tailored and cost and regulatory burdens can be minimized with consultation between ETCs, the FCC and with the Tribal governments. In fact, such targeting and public interest obligation consultations may reduce long-term and overall costs for inefficient targeting and inefficient use of public funds—failing to yield universal service outcomes.

There is a “reasonable fit”⁵⁴ in the Engagement requirement to include the consumer Tribal government in planning the deployment of advanced regulatory service to previously underserved and unserved communities.

The Commission’s new requirements supports a “fair bargaining process”⁵⁵ between the ETC and the consumer, and invites a “fair bargaining process” in regulatory consultations between the Commission and Tribal land ETCs.

III. Conclusion:

⁵⁴ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

⁵⁵ *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1507 (1996).

The Fort Mojave Telecommunications, Incorporated urges the Commission to deny the petitioners' request to reconsider or repeal the Commission's proposed requirement for ETCs to engage with Tribal governments to improve the efficient use of Universal Service and Connect America Funds.

FMTI applauds the pro-active measures the Federal Communications Commission has applied to address the shortfall of universal service. Without extraordinary measures and "out-of-the-box" regulatory solutions, nothing will change the disparity of broadband service and technology on Tribal lands. Moreover, the bare minimum measures proposed by NTTA and FMTI of nation-to-nation consultation, of commercial "Engagement", of adhering to Tribal right-of-way and business permitting, supports the self-sufficiency and sovereignty principles implicit in the Trust relationship responsibility of the Federal Government to Tribal Nations.

The day is late for Native communities to catch up with advanced communications access and technologies enjoyed by all other Americans. The Federal Communications Commission should not turn back from the path of engendering communications parity for Tribal Nations. In fact, the Commission must act in greater measure, and with all deliberate speed to promote telecommunications parity, lest we lose an entire generation of Native youth to the digital and analog divide.

Respectfully Submitted,
Luke Johnson, Chairman
Fort Mojave Telecommunications, Incorporated